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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARISTIDES ARGUETA GUTIERREZ, Defendant and Appellant.	B256151 (Los Angeles County Super. Ct. No. VA127749)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed as modified.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Aristides Argueta Gutierrez (defendant) appeals from his judgment of conviction of seven felonies including aggravated sexual assault upon a child under the age of 14 years. He contends that the trial court erred in failing to require the prosecutor to disclose notes and oral statements made by the victim, and in excluding evidence of an opinion expressed by the victim's second grade teacher three or four years earlier. Defendant also contends that the court failed to properly instruct the jury, that the prosecutor misstated the law in closing argument, and that he is entitled to additional presentence conduct credits. We find no merit to defendant's contentions, but find that the trial court awarded presentence custody credits in an unauthorized manner. We thus modify the judgment to correct the award of credits and direct the trial court to issue an amended abstract of judgment. We affirm the judgment as amended.

BACKGROUND

Procedural history

An eight-count amended information charged defendant in counts 1, 2, 3, and 4 with aggravated sexual assault upon a child under the age of 14 years, in violation of Penal Code section 269, subdivision (a).[1] Count 1 was identified as sodomy, count 2 was identified as rape, and counts 3 and 4 were identified as sexual penetration. Counts 5, 6, and 7 each alleged a forcible lewd act upon a child under the age of 14 years, in violation of section 288, subdivision (b)(1); and count 8 charged defendant with a lewd act upon a child under the age of 14 years, in violation of section 288, subdivision (a).

A jury found defendant guilty of counts 2 through 8 as charged, but was unable to reach a verdict on count 1. The trial court declared a mistrial as to that count, which was later dismissed. On May 7, 2014, the court sentenced defendant to a total term of 60 years to life in prison, comprised of a consecutive term of 15 years to life as to each of counts 2, 3, and 4, a consecutive term of five years as to each of counts 5, 6, and 7, and a concurrent term of six years as to count 8. The court imposed mandatory fines and fees and calculated presentence custody credit as 520 actual days, with 78 days of conduct

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

credit which the court made applicable only to counts 5, 6, 7, and 8. Defendant filed a timely notice of appeal from the judgment.

Trial evidence

Overview

Sandra S. was 11 years old at the time the crimes were committed and 12 years old when she testified. Defendant was her stepfather who lived with Sandra, her mother R. Vasquez (Vasquez), and her two half-sisters, who were the daughters of defendant and Vasquez. The family shared one bedroom in their three-bedroom apartment; an uncle lived in one of the others and the third was not used as a bedroom.

Sandra testified about incidents of abuse by defendant from August 2012 to early December 2012. Sandra felt a great deal of guilt because defendant was the father of her two sisters and she did not want them to grow up as she had, without a father. She told Detective Jose Macias that her allegations were false, and that she made them up as a way to get her mother to divorce defendant and go back to Sandra's birth father. Vasquez testified that Sandra was a truthful child, but before she spoke to the police, Sandra never told her that defendant had acted inappropriately. At trial, Sandra recanted at times, and her testimony alternated between claiming to have lied and describing the abuse. Thus, the evidence presented at trial consisted not only of her testimony, but also portions of her preliminary hearing testimony and prior statements made to detectives and a social worker, in addition to defendant's confession.

Count 1-sodomy

On November 28, 2012, while attending a neighbor's birthday party with Vasquez, Sandra was sent home to retrieve her mother's cell phone charger from the bedroom. Defendant was home and followed Sandra into the bedroom. He forcibly pulled down her pants and inserted his penis into her "butt hole." It hurt, and Sandra told defendant to stop. Sandra later told social worker Rebecca Morales, that defendant had tried to insert his penis in her butt and eventually penetrated her vagina.

Count 2-rape

Sometime between August and December 2012, Sandra's mother went to get her hair "painted" and charged Sandra with caring for her younger sisters. After Vasquez left the house, defendant came into the bedroom, pulled down Sandra's pants, and put his penis inside her vagina.

Counts 3 and 4-sexual penetration

On another day between August and December 2012, when Sandra's Aunt M. was visiting, Sandra was sitting on the couch next to defendant while M. and Vasquez were outside on the balcony. Defendant put a pillow over Sandra's legs, and despite her efforts to prevent him, unzipped her shorts. He inserted his finger into her vagina, which hurt.

On another occasion during the same period, Sandra was lying on her mother's bed massaging her mother's leg. Sandra was wearing loose pajama pants, and after Vasquez fell asleep, defendant kept putting his hands inside her pant leg as she scooted away from him. When defendant began to touch Sandra's "private area" with his hands, she tried to push him away, but he persisted and eventually inserted his finger into her vagina. It hurt, and she bled from her vagina afterward.

Count 5-lewd act

On December 3, 2012, Sandra was sitting on the living room couch watching television while Vasquez was in the bedroom with Sandra's sister, when defendant returned home from the store. Defendant sat next to Sandra and pulled down the zipper of her sweater. Sandra pushed it back up, went to the dining table to do her homework, but when she returned to the couch for her backpack, defendant pushed her down onto the couch and gave her a "hickey" on her neck over a period of approximately 15 seconds while she told him to stop and unsuccessfully tried to get up twice. The next day, after the mark on her neck was noticed by friends, Sandra spoke to the school principal and then to police officers about defendant's behavior. Defendant was soon thereafter arrested.

Counts 6 and 7- forcible lewd acts

Once during the August to December period, Sandra was in the kitchen preparing a baby bottle for one of her sisters, when defendant approached her from behind, placed his hands around Sandra's stomach and rubbed his penis on her buttocks. She told him to stop and tried to remove his hands from her stomach, but defendant continued to hold her and rub himself against her.

On another occasion during that time, Sandra was coloring in a book with her sister in the bedroom. When her sister left the room to get her Barbie doll, defendant came in and told Sandra to stand. He then unzipped Sandra's jeans, pulled them down, and touched her vagina. Sandra told him to stop and tried to "fight back" as she attempted to pull her zipper back up.

Count 8-lewd act

Also during the same August to December period, Sandra was changing her clothes in the bedroom with the door closed and locked. Defendant used a key to enter, and then touched Sandra's breasts with his hand.

Defendant's Confession

Defendant was arrested the same day that Sandra went to school with the hickey and told the principal and detectives about defendant's behavior. Detectives Macias and Gallegos interviewed defendant in Spanish for about two and a half hours. The jury viewed a video recording of the interview and was provided a transcript of the translated discussion, with redactions. Detective Macias testified that during the first hour and a half of the interview defendant mostly denied or minimized what he had done to Sandra, but he admitted having given Sandra a hickey on the neck, kissing her six times on various occasions, touching her breast and buttocks, and inserting his penis into her vagina twice.

Defendant blamed Sandra for being provocative and having instigated his acts, while he resisted. He claimed that she pulled her pants down, bent over, and pulled him toward her, causing his penis to enter her. Defendant also claimed that when they kissed, Sandra was the one to insert her tongue, and that she had grabbed his hand, placed it on

her breast and buttocks, and inserted his finger into her vagina. Defendant explained that when he put his penis into her vagina, it was only a little, just the tip.

DISCUSSION

I. Prosecutor's notes

Defendant contends that the trial court erroneously failed to order the prosecutor to turn over notes of the interview of Sandra that she and Detective Gallegos conducted just before Sandra's trial testimony. Sandra testified that she met with the prosecutor and the detective on March 11, the day before trial began, and did not tell them that her allegations were lies. Defense counsel, who was not present at the interview, requested a copy of the prosecutor's notes and report, or a summary of Sandra's statements. Detective Gallegos told the court that he had not taken notes or prepared a report, and the prosecutor told the court that there was no report. The trial court found that the prosecutor's notes would be attorney work product, and denied the request. The court noted that defense counsel could question Detective Gallegos regarding what was said during the interview, and offered defense counsel the opportunity to speak with the detective prior to cross-examination of Sandra.

Under the reciprocal discovery statute, the prosecution must disclose all written or recorded statements of witnesses who are expected to be called at trial. (§ 1054.1, subd. (f).) The statute does not require disclosure of attorney work product. (*People v. Verdugo* (2010) 50 Cal.4th 263, 281.) Defendant's motion must demonstrate that the requested information will assist in the defense or be useful for impeachment or cross-examination. (*People v. Jenkins* (2000) 22 Cal.4th 900, 953.) The trial court's ruling is reviewed for an abuse of discretion (*People v. Ayala* (2000) 23 Cal.4th 225, 299), and it is defendant's burden to demonstrate an abuse of the court's discretion. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366.) "A violation of section 1054.1 is subject to the harmless-error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.]" (*People v. Verdugo, supra,* at p. 280.) It is defendant's burden to demonstrate prejudice. (*People v. Jenkins, supra,* at p. 950.)

Assuming for discussion that the prosecutor had notes of the interview which were not attorney work product, or that such material could have been redacted, defendant has demonstrated neither an abuse of discretion nor prejudice. When the trial court informed defense counsel that he would have the opportunity to speak to Detective Gallegos prior to cross-examination, the court added, "and then I'll take it up again." The record does not reflect that defense counsel availed himself of the opportunity to interview Detective Gallegos, or that he brought the issue up again. Had counsel done so, he might have been able to make the required showing that the prosecutor's notes were not work product or could be redacted, and that they would assist in the defense or be useful for impeachment or cross-examination. In the absence of that showing, defendant has failed to meet his burden to demonstrate that disclosure was required or that the trial court abused its discretion.

Defendant contends that reversal is required because the trial court's failure to inquire further made it impossible for defendant to demonstrate prejudice. Defendant had ample opportunity to draw out conflicts and inconsistencies in Sandra's pretrial statements, her preliminary hearing testimony, and her trial testimony, and he has cited no authority for his suggestion that the trial court was required to remind him of his opportunity to speak to Detective Gallegos and revisit the issue. Authority cited by respondent suggests otherwise. (See *People v. Verdugo*, *supra*, 50 Cal.4th at p. 283 [defendant failed to demonstrate why opportunity to recall witness for further cross-examination did not cure any harm].) Defendant has not shown that it was impossible to demonstrate prejudice; he has shown only that defense counsel apparently determined that it was unnecessary to pursue the issue.

II. Statements of second grade teacher

Defendant contends that the trial court erred in precluding him from eliciting Vasquez's testimony regarding statements made by Sandra's second grade teacher three or four years earlier at a parent-teacher conference, reflecting the teacher's opinion that Sandra had trouble distinguishing between reality and fantasy. Vasquez had testified on direct examination that in general, Sandra was a truthful person, although as she was a

young child, she sometimes had problems. Defendant contends that the evidence was admissible, because it is generally considered proper cross-examination of a character witness to inquire, in good faith, whether the witness has heard of specific misconduct of the defendant inconsistent with the trait of character testified to on direct. (See *People v. Marsh* (1962) 58 Cal.2d 732, 745.)

When defense counsel sought to go into the teacher's comments during cross-examination, the court agreed that the prosecutor had opened the door to character evidence. The prosecutor then objected to the evidence as hearsay and on relevance grounds, and the court permitted voir dire outside the jury's presence. Vasquez testified that she met with the teacher because she was informed that Sandra was bothering other children in class. The teacher told her that Sandra was interested in learning, tried very hard, was doing well in math, but had problems distinguishing what was real and what was fantasy in her everyday life at school.

Defendant challenges the trial court's exclusion of the evidence under Evidence Code section 352 (section 352), upon finding that Sandra was in the fifth grade at the time of trial, and a wide range of development from the second grade to the fifth grade made the teacher's observation more prejudicial than probative. Under section 352, "[a] trial court may exclude otherwise *relevant* evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 490, italics added.) Contrary to defendant's assertion that the trial court found the evidence relevant, the court also excluded the evidence under Evidence Code section 350 (section 350), although it did not expressly mention that statute. The court stated that the prosecution asked about Sandra's character for honesty, and "evidence which rebuts that is relevant and admissible. *However, . . .* an observation of the teacher of a child in the second grade, *I don't think that's relevant . . .* as to her character for [honesty]." (Italics added.)

Section 350 provides: "No evidence is admissible except relevant evidence." Thus, before reaching defendant's contention that the trial court erred in excluding relevant evidence under section 352, we turn to its ruling that the evidence was not

relevant. "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "We review a trial court's ruling excluding evidence on grounds of irrelevance (Evid. Code, § 350) for abuse of discretion. '"'The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence.'"' [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 444.) A trial court's exercise of discretion with regard to the admissibility of evidence "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Defendant argues: "That a victim of sexual abuse is prone to fantasy goes to the heart of credibility." Defendant also argues that the jury should be permitted to decide, after hearing the opinion of an education professional, whether second graders tend to be more prone to fantasy. Even if we agreed that such an opinion required special expertise, the teacher's observation would do no more than suggest that Sandra *was* prone to fantasy in second grade. As the trial court found, Sandra's fantasy life when she was "extremely young" would not be probative of her character for honesty then or after three or four years of development. We agree that such an observation regarding a seven-year-old child would have no reasonable tendency to prove that an eleven-year-old girl would not be truthful; we thus discern nothing arbitrary, capricious or patently absurd about that finding.

With regard to the court's ruling under section 352, defendant contends that the evidence was not prejudicial at all under the appropriate definition of "prejudice" as evidence that tends to evoke an emotional bias, but has very little effect on the issues. (See *People v. Karis* (1988) 46 Cal.3d 612, 638.) A ruling under section 352 will not be disturbed absent a clear showing that the trial court abused its discretion. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) Defendant's argument is premised upon the

assumption that the evidence was relevant and thus otherwise admissible. As we have concluded that it was not, the trial court did not err in excluding the evidence.

Moreover, it is defendant's burden to demonstrate not only that the ruling was erroneous under section 352, but also that the error resulted in a miscarriage of justice. (*People v. Rodriguez, supra,* 8 Cal.4th at p. 1124; see Evid. Code, §§ 352, 354; Cal. Const., art. VI, § 13.) A miscarriage of justice occurs when it appears that a result more favorable to the appealing party would have been reached in the absence of the alleged errors. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Defendant contends that the ruling violated his constitutional rights of confrontation and to present a defense, and thus respondent bears the burden to demonstrate that any error was harmless beyond a reasonable doubt, under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, applicable to federal constitutional error. A trial court's exercise of discretion under section 352 does not ordinarily implicate the federal Constitution. (*People v. Gonzales* (2011) 51 Cal.4th 894, 924.) And we agree with respondent that nothing about the court's ruling raised constitutional concerns here, as "'the Constitution permits judges "to exclude evidence that is ' . . . only marginally relevant' . . . ."' [Citations.]" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1259.) The Constitution does not require the court to admit "weak and speculative" evidence. (*Ibid.*)

In any event, had the court erred, we would find the error harmless under either standard. As respondent notes, the inconsistencies in Sandra's direct and cross-examination testimony and her recantations presented the jury with ample opportunity to assess Sandra's credibility; and defendant's own confession corroborated Sandra's descriptions of the abuse and provided overwhelming evidence of defendant's guilt. We conclude beyond a reasonable doubt that the verdict would have been the same absent any error.

III. Unanimity

Defendant contends that the trial court erred in failing to instruct the jury sua sponte that it must unanimously agree as to which act of digital penetration supported count 3 and which act of digital penetration supported 4, and that it must unanimously

agree as to which forcible lewd act supported count 6, and which forcible lewd act supported count 7. No unanimity instruction was required here.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "It is established that some assurance of unanimity is required where the evidence shows that the defendant has committed two or more similar acts, each of which is a separately chargeable offense, but the information charges fewer offenses than the evidence shows. [Citation.]" (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 611-612.) Thus, "if one criminal act is charged, but the evidence tends to show the commission of more than one such act, '*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.' [Citations.]" (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) "'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' [Citation.]" (*People v. Russo, supra*, at p. 1132)

Counts 3 and 4 each alleged sexual penetration in violation 289, subdivision (a). "'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object . . . [¶] [including] any part of the body, except a sexual organ." (§ 289, subd. (k)(1), (2).) The evidence showed that during the relevant period, defendant digitally penetrated the victim's vagina on two occasions, once on the couch during the time that Sandra's aunt was visiting, and another time when Sandra was on the bed massaging her sleeping mother's leg. Our review of the record has revealed no evidence of other acts of sexual penetration as defined in the statute, and defendant does not point to any such evidence.

Counts 6 and 7 allege forcible lewd act upon a child, in violation of section 288, subdivision (b)(1). "[S]ection 288 is violated by 'any touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 442.) The evidence showed two such incidents, once in the kitchen when defendant held Sandra with both hands and rubbed his penis on her buttocks, and another time when defendant touched Sandra's vagina after her sister left the room to get her Barbie doll. Our review of the record has revealed no evidence of other acts of forcible lewd touching, and defendant does not identify any such evidence.

Defendant focuses on the adequacy of the prosecutor's election with regard to counts 3 and 4. He asserts that the prosecutor argued that there were two incidents of sexual penetration alleged in count 3, and that she neglected to address count 4 altogether. We disagree with defendant's strained interpretation of the prosecutor's argument. The prosecutor began her summation with an explanation of which acts constituted each crime charged, and told the jury that the two acts of sexual penetration referred to the two instances when defendant inserted his finger into the victim's vagina. While she expressly referred to count 3 and described the evidence supporting that count and neglected to expressly name count 4 when she then moved on to discuss the evidence supporting that count, she then expressly named count 5 and discussed that count, making it reasonably clear that the second act of sexual penetration she had discussed after count 3 was the act charged in count 4.

In any event, defendant's contention that the prosecutor's election was inadequate begs the question whether the prosecution was required to make an election in the first instance. Defendant does not claim that there was evidence of three or more acts constituting counts 3 and 4, or that there was evidence of three or more acts constituting counts 6 and 7. Under such circumstances, neither an election nor a sua sponte instruction was required, as this was not a case where the information charged fewer offenses than the evidence shows. (See *People v. Napoles, supra,* 104 Cal.App.4th at p. 114; *People v. Sutherland, supra,* 17 Cal.App.4th at pp. 611-612.) A unanimity instruction is required only if the evidence shows acts that could have been charged as

separate offenses but were not, and the jurors could disagree as to which act constituted the crime charged. (*People v. Maury* (2003) 30 Cal.4th 342, 422-423.) As that is not the situation here, it would only have caused confusion by instructing the jury that it must unanimously agree which of the two acts of digital penetration supported count 3 and which of the same two acts of digital penetration supported count 4; or that it must unanimously agree as to which of two forcible lewd acts supported count 6, and which of the same two forcible lewd acts supported count 7. "It is well established that a trial court is not obligated to give an instruction if the evidence presented at trial is such as to preclude a reasonable jury from finding the instruction applicable. [Citation.]" (*People v. Schultz* (1987) 192 Cal.App.3d 535, 539.)

For the same reasons, defendant cannot have been prejudiced by the absence of a unanimity instruction. Two acts of sexual penetration and two acts of forcible lewd conduct were charged in the information, the evidence demonstrated no more than two of each of the two offenses, and the jury found defendant guilty of all four offenses. The result would be the same whether, for example, some jurors thought the aunt's visit was count 3, while others thought it was count 4, and that the coloring book incident was count 3. As there was no danger that jurors would base their verdicts on uncharged or unproven acts, omission of the instruction was not only harmless beyond a reasonable doubt, but proper.

IV. Prosecutor's argument

Defendant contends that the judgment must be reversed because the prosecutor distorted the presumption of innocence and marginalized the prosecution's burden of proof in her final summation in three passages.

"Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' [Citations.] To establish such error, bad faith on the prosecutor's part is not required. [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*).)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*Id.* at p. 667.)

Defendant did not object to the first challenged passage, which was the following: "And what is the prosecution's burden? It's 'innocent,' remember? You are to presume him innocent until there is evidence that he is guilty of the crime. So don't be mistaken about, 'Oh, well, he's guilty and I have to prove him innocent.' No. He is innocent until the people have given you testimony, evidence and corroboration that he committed all of those crimes of forcible lewd acts on a child and aggravated sexual assault on a child."

The second passage was the following: "And just lightly touching on the proof beyond a reasonable doubt here, ladies and gentlemen. I know that he is charged with eight counts. Proof beyond a reasonable doubt is the proof that after the witness has testified and the evidence has been presented. That means the video, that means photos, that you believe in the truth of the charge, that whatever the people charge in this case is true. It is true that --"

Defense counsel objected to the second passage on the ground that it misstated the law, and the trial court overruled the objection. The prosecutor continued to the third passage: "Proof beyond a reasonable doubt is not a fraction, it's not percentages. It's each and every one of you when you go back into the jury deliberation room that you believe those charges are true. It's not proof beyond all doubt but just proof based upon reasons. Do you have reasons to convict?"

Respondent contends that defendant has forfeited any challenge to the first passage by failing to object and request that the jury be admonished to disregard it, and that in any event, when viewed in context, there was no reasonable likelihood that the jury was misled by the challenged remarks. Defendant counters that the court's ruling on the second passage indicated that any objection would be futile and thus excused. (See

Centeno, *supra*, 60 Cal.4th at p. 674.) Regardless, we reach the issue, as deeming one of three related passages to have been forfeited would not have the effect of foreclosing discussion of it, as the analysis must be made in the context of the whole argument. (*Id.* at p. 667.) Nevertheless, we agree with respondent that viewing the three passages in context reveals no reasonable likelihood that the jury was misled by the remarks.

Although the trial court did not mention the presumption of innocence or the burden of proof in its initial instructions, the jury was aware of the presumption of innocence when the trial began, as it was discussed during voir dire.[2] Counsel's closing arguments were made prior to final instructions by the court, and when defendant objected to the second passage, the court admonished the jury: "I will be instructing you on the law and you are to follow my instruction as I give it to you." Early in her summation, the prosecutor told the jury that the court would give them instructions on the law applicable in this case, and that they would have to refer to those instructions during deliberations. She read instructions regarding the elements of the offenses, and told the jury numerous times that the prosecution was required to prove those elements.

Then, in his summation, defense counsel spoke of the presumption of innocence and burden of proof, and explained the concepts to the jury. The challenged remarks by the prosecutor were made in response to defense counsel's account of his girlfriend's comment that "for these kinds of charges" it seemed that there was a presumption of guilt until the defendant proved himself innocent. Defense counsel then told the jury that the rules were the same as in other types of criminal prosecutions, that "[t]he exact same instructions will be read on proof beyond a reasonable doubt," and that the jury should believe the prosecution witnesses' testimony only "to the extent you can say beyond all reasonable doubt as to what happened."

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[2] The nature of the discussion is unknown, as jury selection was not transcribed; however, we assume it was explained, as defense counsel acknowledged in closing argument that the presumption of innocence had been discussed during voir dire.

It is apparent that the first passage was intended to respond to defense counsel's argument, and that the prosecutor was referring to the presumption of innocence, not the quantum of proof required. She began by referring to the defense suggestion that with these particular charges, the presumption was one of guilt, and then stated, "No, ladies and gentlemen. It doesn't work that way." She then told the jurors they must "presume [defendant] innocent until there is evidence that he is guilty of the crime." It was later that the prosecutor discussed the quantum of proof required for a conviction. In the second passage, her comment about "lightly touching on the proof beyond a reasonable doubt" could have been more articulate, but it was sufficiently clear that it was merely meant to be a summary of the evidence that in her opinion, amounted to proof beyond a reasonable doubt: witness testimony, the video, and photographs. Only the third passage was truly confusing, and could be considered misleading to the extent that the prosecutor suggested that proof beyond a reasonable doubt was "just proof based upon reasons." However, any confusion was soon cleared up, as the trial court instructed the jury the same day.

Prior to reading the instructions, the court informed the jury that it would have a packet of the specific instructions applicable to this case, and further told them, "[Y]ou will have to refer to those instructions when you deliberate." The court then told the jury that the attorneys' comments on the evidence were not evidence. Early in the charge, the court read CALCRIM No. 220, as follows: "A defendant in a criminal trial is presumed to be innocent. This presumption requires that the People prove the defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all of the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty

beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

Later in the charge, the court instructed the jury to consider defendant's statements with caution and that conviction could not be based upon his out-of-court statement alone. The court then told the jury: "You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

The court thus had the last word on the applicable law. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Given the circumstances, the instructions and the court's admonition to the jury that the court's instructions must be followed, it is not reasonably likely that the prosecutor's comments led the jury to disregard or misunderstand the court's instructions, or to apply the prosecutor's comments in an improper or erroneous manner. (Cf. *People v. Archer* (1989) 215 Cal.App.3d 197, 204.)

V. Presentence custody credits

Defendant contends that the trial court erred in failing to award conduct credit against his two indeterminate life terms, and that he is thus entitled to an additional 78 days of conduct credit. Respondent disagrees in part, and contends that defendant received the correct number of conduct credits, but the trial court erroneously ordered the conduct credits to apply only to counts 5, 6, 7, and 8, because they were determinate terms. Respondent also notes that the error is reflected in the abstract of judgment in such a way as to make it appear that defendant received 78 days of conduct credit, but also 1,040 actual days of credit, comprised of 520 days applicable to counts 2, 3, and 4, and another 520 actual days credit applicable to counts 5, 6, 7, and 8.

"The circumstance that a defendant is sentenced to an indeterminate sentence does not preclude the earning of presentence conduct credit. [Citations.]" (*People v. Duff* (2010) 50 Cal.4th 787, 793; § 2900.5.) The same credit may not be awarded more than once, and is applied to the defendant's term of imprisonment as part of the sentence. (*Duff*, at p. 793; § 2900.5, subd. (a), (b), (d).) Credit is given only for custody

attributable to the conduct leading to the conviction in the proceedings in which the defendant was sentenced. (*In re Marquez* (2003) 30 Cal.4th 14, 23; *People v. Huff* (1990) 223 Cal.App.3d 1100, 1105.)

At sentencing, the parties agreed that defendant had spent 520 actual days in custody due to the charges in this case. Conduct credit was limited to 15 percent of the actual days, 78 days. (See §§ 2933.1, subd. (a); 667.5, subd. (c).) As there was no question of custody on unrelated charges, the total award 598 days of credit, should have been applied to defendant's entire sentence. As the manner of the award was unauthorized, we may correct the judgment accordingly. (See *People v. Acosta* (1996) 48 Cal.App.4th 411, 428 & fns. 8, 9.)

DISPOSITION

The judgment is modified to award presentence custody credit of 520 actual days and 78 days of conduct credit, applied to defendant's entire sentence. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modified presentence custody credit award, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT